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COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

RIN 3038-AD85

Further Proposed Guidance Regarding Compliance with Certain Swap Regulations

AGENCY: Commodity Futures Trading Commission

ACTION: Further Proposed Guidance

SUMMARY: On July 12, 2012, the Commodity Futures Trading Commission (“Commission” or “CFTC”) published for public comment, pursuant to section 4(c) of the Commodity Exchange Act (“CEA”), a proposed order (“Proposed Order”) that would grant market participants temporary conditional relief from certain provisions of the CEA, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Dodd-Frank”), and the Commission also published its proposed interpretive guidance and policy statement (“Proposed Guidance”) regarding the cross-border application of the swap provisions of the CEA as added by Title VII of the Dodd-Frank Act. The Commission is proposing further guidance on certain specific aspects of the Proposed Guidance (“Further Proposed Guidance”). The Commission has separately determined to finalize the Proposed Order.

DATES: Comments on the Further Proposed Guidance must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]

ADDRESSES: You may submit comments, identified by RIN number 3038-AD85, by any of the following methods:

- Agency Web Site: <http://www.cftc.gov>
- Mail: Secretary of the Commission, Commodity Futures Trading
Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington,
DC 20581
- Hand Delivery/Courier: Same as mail above
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow
instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to www.cftc.gov. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedure established in CFTC regulation 145.9 (17 CFR 145.9).

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from www.cftc.gov that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Carlene S. Kim, Deputy General Counsel, (202) 418-5613, ckim@cftc.gov, Terry Arbit, Deputy General Counsel, (202) 418-5357, tarbit@cftc.gov, Mark Fajfar, Assistant General Counsel, (202) 418-6636,

mfajfar@cftc.gov, Office of General Counsel; Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, (202) 418-5977, gbarnett@cftc.gov; Jacqueline H. Mesa, Director, Office of International Affairs, (202) 418-5386, jmesa@cftc.gov; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act,¹ which amended the CEA² to establish a new regulatory framework for swaps. The legislation was enacted to reduce systemic risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) providing for the registration and comprehensive regulation of swap dealers (“SDs”) and major swap participants (“MSPs”); (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating rigorous recordkeeping and data reporting regimes with respect to swaps, including real-time public reporting; and (4) enhancing the Commission’s rulemaking and enforcement authorities over all registered entities, intermediaries, and swap counterparties subject to the Commission’s oversight. Section 722(d) of the Dodd-Frank Act also amended the CEA to add section 2(i), which provides that the swap provisions of the CEA apply to cross-border activities when certain conditions are met, namely, when such activities have a “direct and significant

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010).

² 7 U.S.C.1 et seq. (amended 2010).

connection with activities in, or effect on, commerce of the United States” or when they contravene Commission rulemaking.³

In the two years since its enactment, the Commission has finalized 41 rules to implement Title VII of the Dodd-Frank Act. The finalized rules include those promulgated under CEA section 4s,⁴ which address registration of SDs and MSPs and other substantive requirements applicable to SDs and MSPs. Notably, many section 4s requirements applicable to SDs and MSPs are tied to the date on which a person is required to register, unless a later compliance date is specified.⁵ A number of other rules specifically applicable to SDs and MSPs have been proposed but not finalized.⁶

Further, the Commission published for public comment the Proposed Guidance,⁷ which set forth the manner in which it proposed to interpret section 2(i) of the CEA as it applies to the requirements under the Dodd-Frank Act and the Commission’s regulations promulgated thereunder regarding cross-border swap activities. Specifically, in the Proposed Guidance, the Commission described the general manner in which it proposed to consider: (1) whether a non-U.S. person’s swap dealing activities are sufficient to

³ 7 U.S.C. 2(i)

⁴ 7 U.S.C 6s.

⁵ Examples of section 4s implementing rules that become effective for SDs and MSPs at the time of their registration include requirements relating to swap data reporting (Commission regulation 23.204) and conflicts of interest (Commission regulation 23.605 (c)-(d)). The chief compliance officer requirement (Commission regulations 3.1 and 3.3) is an example of those rules that have specific compliance dates. The compliance dates are summarized on the Compliance Dates page of the Commission’s web site. (<http://www.cftc.gov/LawRegulation/DoddFrankAct/ComplianceDates/index.htm>).

⁶ These include rules under CEA section 4s(e), 7 U.S.C. 6s(e) (governing capital and margin requirements for SDs and MSPs).

⁷ “Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act,” 77 FR 41214, Jul. 12, 2012.

require registration as a “swap dealer”,⁸ as further defined in a joint release adopted by the Commission and the Securities and Exchange Commission (“SEC”) (collectively, the “Commissions”);⁹ (2) whether a non-U.S. person’s swap positions are sufficient to require registration as a “major swap participant,”¹⁰ as further defined in the Final Entities Rules; and (3) the treatment of foreign branches, agencies, affiliates, and subsidiaries of U.S. SDs and of U.S. branches of non-U.S. SDs. The Proposed Guidance also generally described the policy and procedural framework under which the Commission may permit compliance with a comparable regulatory requirement of a foreign jurisdiction to substitute for compliance with the requirements of the CEA. Last, the Proposed Guidance set forth the manner in which the Commission proposed to interpret section 2(i) of the CEA as it applies to the clearing, trading, and certain reporting requirements under the Dodd-Frank Act with respect to swaps between counterparties that are not SDs or MSPs.

Contemporaneously with the Proposed Guidance, the Commission published the Proposed Order pursuant to section 4(c) of the CEA,¹¹ in order to foster an orderly transition to the new swaps regulatory regime and to provide market participants greater certainty regarding their obligations with respect to cross-border swap activities during

⁸ 7 U.S.C. 1a(49).

⁹ See “Further Definition of ‘Swap Dealer,’ ‘Security-Based Swap Dealer,’ ‘Major Swap Participant,’ ‘Major Security-Based Swap Participant’ and ‘Eligible Contract Participant,’” 77 FR 30596, May 23, 2012 (“Final Entities Rules”).

¹⁰ 7 U.S.C 1a(33).

¹¹ “Exemptive Order Regarding Compliance With Certain Swap Regulations,” 77 FR 41110 Jul. 12, 2012.

the pendency of the Proposed Order. The Proposed Order would grant temporary relief from certain swap provisions of Title VII of the Dodd-Frank Act.

The public comment periods on the Proposed Order and the Proposed Guidance ended on August 13, 2012 and August 27, 2012, respectively. The Commission received approximately 26 letters on the Proposed Order and approximately 288 letters on the Proposed Guidance from a variety of market participants and other interested parties, including major U.S. and non-U.S. banks and financial institutions that conduct global swaps business, trade associations, clearing organizations, law firms (representing international banks and dealers), individual citizens, and foreign regulators.¹² The Commission staff also held numerous meetings and discussions with various market participants, domestic bank regulators, and other interested parties to discuss the Proposed Order and the Proposed Guidance.¹³

Further, the Commission staff closely consulted with the staff of the SEC in an effort to increase understanding of each other's regulatory approaches and to harmonize the cross-border approaches of the two agencies to the greatest extent possible, consistent

¹² Some of the commenters submitted a single comment letter addressing both the Proposed Order and the Proposed Guidance. The comment letters submitted in response to the Proposed Order and Proposed Guidance may be found on the Commission's web site at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1234>.

Approximately 200 individuals submitted substantially identical letters to the effect that oversight of the \$700 trillion global derivatives market is the key to meaningful reform. The letters stated that because the market is inherently global, risks can be transferred around the world with the touch of a button. Further, according to these letters, loopholes in the Proposed Guidance could allow foreign affiliates of Wall Street banks to escape regulation. Lastly, the letters requested that the Proposed Guidance be strengthened to ensure that the Dodd-Frank derivatives protections will directly apply to the full global activities of all important participants in the U.S. derivatives markets.

¹³ The records of these meetings and communications can be found on the Commission's web site at: <http://cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings/index.htm>.

with their respective statutory mandates.¹⁴ The Commission expects that this consultative process will continue as each agency works towards implementing its respective cross-border policy.

The Commission also recognizes the critical role of international cooperation and coordination in the regulation of derivatives in the highly interconnected global market, where risks are transmitted across national borders and market participants operate in multiple jurisdictions. Close cooperative relationships and coordination with other jurisdictions take on even greater importance given that, prior to the recent reforms, the swaps market has largely operated without regulatory oversight and many jurisdictions are in differing stages of implementing their regulatory reform. To this end, the Commission staff has actively engaged in discussions with their foreign counterparts in an effort to better understand and develop a more harmonized cross-border regulatory framework. The Commission expects that these discussions will continue as it finalizes the cross-border interpretive guidance and as other jurisdictions develop their own regulatory requirements for derivatives.¹⁵

The Commission has determined not to take further action on the Proposed Guidance at this time. The Commission believes it will be beneficial to have further

¹⁴ In addition to differences in the applicable statutory provisions, there are also differences in the markets and products overseen by each agency, which may lead to divergent approaches to cross-border activities.

¹⁵ This is one aspect of the Commission's on-going bilateral and multilateral efforts to promote international coordination of regulatory reform. The Commission staff is engaged in consultations with Europe, Japan, Hong Kong, Singapore, Switzerland, Canada, Australia, Brazil, and Mexico on derivatives reform. In addition, the Commission staff is participating in several standard-setting initiatives, co-chairs the IOSCO Task Force on OTC Derivatives, and has created an informal working group of derivatives regulators to discuss implementation of derivatives reform. See also Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-border OTC Derivatives Market, included in CFTC Press Release 6439-12, Dec. 4, 2012.

consultations with other domestic and international regulators in an effort to harmonize cross-border regulatory approaches prior to taking action with respect to the Proposed Guidance. The Commission also believes that further consideration of public comments, including the comments that may be received on the Further Proposed Guidance regarding the Commission's interpretation of the term "U.S. person," and its guidance regarding aggregation for purposes of SD registration, will be helpful to the Commission in issuing final interpretive guidance.

Nonetheless, the Commission has separately determined to finalize the Proposed Order as a final, time-limited exemptive order ("Final Order") that is substantially similar to the Proposed Order, except for the addition of provisions regarding registration and certain modifications and clarifications addressing public comments.¹⁶ Under the Final Order, a non-U.S. person that registers as an SD or MSP may delay compliance with certain entity-level requirements of the CEA (and Commission regulations promulgated thereunder), and non-U.S. SDs and MSPs and foreign branches of U.S. SDs and MSPs may delay compliance with certain transaction-level requirements of the CEA (and Commission regulations promulgated thereunder), subject to specified conditions. Recently, the Commission staff granted time-limited, no-action relief to promote continuity in the application of Dodd-Frank requirements and facilitate the transition to those requirements by enabling swap market participants to apply a uniform and readily ascertainable standard regarding which swaps must be included in the calculations under

¹⁶ See "Final Exemptive Order Regarding Compliance with Certain Swap Regulations," Dec. 21, 2012.

the SD and MSP definitions.¹⁷ The Final Order continues that process and furthers the same purposes.¹⁸

This release sets forth the Further Proposed Guidance.

II. Further Proposed Guidance

The Commission continues to review and consider the comments received on the Proposed Guidance, and to discuss these issues with domestic and foreign regulators. In this process, the Commission is considering several approaches that may further the purposes of the Proposed Guidance, which include enabling swap market participants to apply a uniform and readily ascertainable standard regarding which swaps must be included in the calculations under the SD and MSP definitions. In order to facilitate the Commission's further consideration of these issues, the Commission seeks comment on the following proposed interpretations.

A. Aggregation of Affiliates' Swaps for Purposes of the De Minimis Test

Commission regulation 1.3(ggg)(4) requires that a person include, in determining whether its swap dealing activities exceed the de minimis threshold, the aggregate notional value of swap dealing transactions entered by its affiliates under common control.¹⁹ Under the Proposed Guidance, a non-U.S. person, in determining whether its swap dealing transactions exceed the de minimis threshold, would include the aggregate

¹⁷ See CFTC Division of Swap Dealer and Intermediary Oversight, Re: Time-Limited No-Action Relief: Swaps Only With Certain Persons to be Included in Calculation of Aggregate Gross Notional Amount for Purposes of Swap Dealer De Minimis Exception and Calculation of Whether a Person is a Major Swap Participant, No-Action Letter No.12-22, Oct. 12, 2012 ("CFTC Letter No. 12-22").

¹⁸ The Commission intends that the Final Order is in addition to any no-action relief issued or to be issued by the Commission staff. Unless specifically provided in any letter providing no-action relief, the Final Order does not limit the availability of any no-action relief.

¹⁹ 17 CFR 1.3(ggg)(4).

notional value of swap dealing transactions entered into by its non-U.S. affiliates under common control but would not include the aggregate notional value of swap dealing transactions entered into by its U.S. affiliates.²⁰ The Final Order provides that a non-U.S. person is not required to include, in its determination of whether it exceeds the de minimis threshold, the swap dealing transactions of any of its U.S. affiliates, and a non-U.S. person that is an affiliate of a person that is registered as an SD is not required to include in such determination the swap dealing transactions of any of its non-U.S. affiliates that engage in swap dealing activities, so long as such excluded affiliates are either (1) engaged in swap dealing activities with U.S. persons as of the effective date of the Final Order or (2) registered as an SD.²¹

The Commission also is proposing an alternative interpretation of the aggregation requirement in Commission regulation 1.3(ggg)(4). Under this alternative, a non-U.S. person would be required, in determining whether its swap dealing transactions exceed the de minimis threshold, to include the aggregate notional value of swap dealing transactions entered into by all its affiliates under common control (i.e., both non-U.S. affiliates and U.S. affiliates), but would not be required to include in such determination

²⁰ Proposed Guidance, 77 FR at 41218-41220. Further, where the potential non-U.S. SD's swap obligations are guaranteed by a U.S. person, the non-U.S. person would be required to register with the Commission as an SD when the aggregate notional value of its swap dealing activities (along with the swap dealing activities of its non-U.S. affiliates that are under common control and also guaranteed by a U.S. person) with U.S. persons and non-U.S. persons exceeds the de minimis threshold. Additionally, the Proposed Guidance clarified that a non-U.S. person without a guarantee from a U.S. person would not be required to register as an SD if it does not engage in swap dealing with U.S. persons as part of "a regular business" with U.S. persons, even if the non-U.S. person engages in dealing with non-U.S. persons.

²¹ See Final Order paragraph (3). For this purpose, the Commission construes "affiliates" to include persons under common control as stated in the Final Entities Rules with respect to the term "swap dealer," which defines control as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise." See Final Entities Rules, 77 FR at 30631, fn. 437.

the aggregate notional value of swap dealing transactions of any non-U.S. affiliate under common control that is registered as an SD.²²

Under the aggregation rule stated in Commission regulation 1.3(ggg)(4), any affiliate of a person that is registered as an SD will also have to register if it engages in any swap dealing transactions, even if the aggregate amount of such swap dealing transactions among all the unregistered affiliates is below the de minimis threshold. Based on comments received, the Commission understands that the application of this requirement to non-U.S. affiliates of non-U.S. SDs may, in certain circumstances, impose significant burdens on such non-U.S. affiliates without advancing significant regulatory interests of the Commission. Because the conduct of swap dealing business through locally-organized affiliates may in some cases be required in order to comply with legal requirements or business practices in foreign jurisdictions, such non-U.S. affiliates may be numerous and it would be impractical to require all such non-U.S. affiliates to register as SDs. Further, the Commission's interest in registration may be reduced for a non-U.S. affiliate of a registered non-U.S. SD where the non-U.S. affiliate (or group of such affiliates) engages in only a small amount of swap dealing activity with U.S. persons.

On the other hand, the Commission has also considered that given the borderless nature of swap dealing activities, an SD may conduct swap dealing activities through various affiliates in different jurisdictions, which suggests that its interpretation should take into account the applicable swap dealing transactions entered by all of a non-U.S. person's affiliates under common control worldwide. Otherwise, affiliated persons may

²² Also, under this alternative, a non-U.S. person would not be required to include the aggregate notional value of swap dealing transactions of any of its non-U.S. affiliates under common control where the counterparty to such affiliate is also a non-U.S. person.

not be required to register solely because their swap dealing activities are divided, such that each affiliate falls below the de minimis level. The Commission is concerned that permitting such affiliates whose swap dealing activities individually fall below the de minimis level, but whose swap dealing activities in the aggregate exceed the de minimis level, to avoid registration as SDs would provide an incentive for firms to spread their swap dealing activities among several unregistered affiliates rather than centralize their swap dealing in registered firms. Such a result would increase systemic risks to U.S. market participants and impede the Commission's ability to protect U.S. markets.

The Commission requests comment on all aspects of this proposed alternative approach. In particular, should this interpretation apply to non-U.S. persons that are guaranteed by a U.S. person with respect to their swap obligations in the same way that it applies to non-U.S. persons that are not so guaranteed? If so, should the Commission continue to construe the term "guarantee" for this purpose to mean any collateral promise by a guarantor to answer for the debt or obligation of an obligor under a swap?²³ Should the term "guarantee" include arrangements such as keepwells and liquidity puts?

Would it be appropriate that non-U.S. persons are not required to include in the de minimis calculation the swap dealing transactions of their U.S. affiliates under common control? Alternatively, should non-U.S. persons be permitted to exclude from the de minimis calculation the swap dealing transactions of their U.S. affiliates under common control that are registered as SDs?

²³ See "Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping," 77 FR 48207, 48225 fn. 185, Aug. 13, 2012.

To the extent that the Commission adopts a final interpretation that does not require a person to include the swap dealing activities of one or more of its affiliates under common control in its determination of whether its swap dealing activity exceeds the de minimis threshold, the Commission is interested in commenters' views as to whether a person engaged in swap dealing activities could take advantage of such an interpretation to spread its swap dealing activities into multiple affiliates, each under the de minimis threshold, and therefore avoid the registration requirement, even though its aggregate level of swap dealing by the affiliates exceeds the de minimis threshold. Accordingly, if the Commission were to adopt such an interpretation with respect to aggregation, should the Commission include any conditions or limits in any such interpretation on the overall amount of swap dealing engaged in by unregistered persons within an affiliated group?

B. Definition of "U.S. Person"

As noted above, in the Proposed Guidance the term "U.S. person" would be defined by reference to the extent to which swap activities or transactions involving one or more such persons have the relevant connection with activities in, or effect on, U.S. commerce.²⁴ That is, the term "U.S. person" identifies those persons whose swap

²⁴ See Proposed Guidance, 77 FR at 41218. Specifically, as set forth in the Proposed Guidance, the definition of the term "U.S. person" would include, but not be limited to:

- (i) any natural person who is a resident of the United States;
- (ii) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, in each case that is either (A) organized or incorporated under the laws of the United States or having its principal place of business in the United States (legal entity) or (B) in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person;
- (iii) any individual account (discretionary or not) where the beneficial owner is a U.S. person;

activities – either individually or in the aggregate – satisfy the jurisdictional nexus under section 2(i) of the CEA.

The Commission is proposing alternatives for two “prongs” of the proposed definition of the term “U.S. person” in the Proposed Guidance: prong (ii)(B), which relates to U.S. owners that are responsible for the liabilities of a non-U.S. entity; and prong (iv), which relates to commodity pools and funds with majority-U.S. ownership.

The Commission’s proposed alternative version of prong (ii)(B) would limit its scope to a legal entity that is directly or indirectly majority-owned by one or more natural persons or legal entities that meet prong (i) or (ii) of the definition of the term “U.S. person” in the Final Order, in which such U.S. person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity. This alternative prong (ii)(B) would not include an entity that is a limited liability company or limited liability partnership where partners have limited liability. Further, the majority-ownership criterion would avoid capturing those legal entities that have negligible U.S. ownership interests. Unlimited liability corporations where U.S. persons have majority ownership and where

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- (iv) any commodity pool, pooled account or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership is held, directly or indirectly, by a U.S. person(s);
 - (v) any commodity pool, pooled account or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA;
 - (vi) a pension plan for the employees, officers or principals of a legal entity with its principal place of business inside the United States; and
 - (vii) an estate or trust, the income of which is subject to U.S. income tax regardless of source.

such U.S. persons have unlimited liability for the obligations and liabilities of the entity would be covered under this alternative to prong (ii)(B).²⁵

The alternative prong (ii)(B) would be as follows:

- (ii) A corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, in each case that is either (A) organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States or (B) directly or indirectly majority-owned by one or more persons described in prong (i) or (ii)(A) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity (other than a limited liability company or limited liability partnership where partners have limited liability);

This alternative proposed prong would treat an entity as a U.S. person if one or more of its U.S. majority owners has unlimited responsibility for losses of, or nonperformance by, the entity. This would reflect that when the structure of an entity is such that the U.S. direct or indirect owners are ultimately liable for the entity's obligations and liabilities, the connection to activities in, or effect on, U.S. commerce satisfies the requisite jurisdictional nexus. This "look-through" requirement also would serve to prevent persons from creating such indirect ownership structures for the purpose

²⁵ Unlimited liability corporations include, solely by way of example, entities such as an unlimited company formed in the U.K. (see Brian Stewart, Doing Business in the United Kingdom § 18.02[2][c]) or an unlimited liability company formed under the law of Alberta, British Columbia or Nova Scotia (see Richard E. Johnston, Doing Business in Canada § 15.04[5]).

of evading the Dodd-Frank regulatory regime. However, this alternative proposed prong would not cover a legal entity organized or domiciled in a foreign jurisdiction simply because the entity's swap obligations are guaranteed by a U.S. person.

The Commission requests comment on all aspects of this alternative prong (ii)(B).

With respect to prong (iv) of the definition of the term "U.S. person" in the Proposed Guidance, which relates to majority direct- or indirect- owned commodity pools, pooled accounts, or collective investment vehicles, the Commission is proposing an alternative under which any commodity pool, pooled account, investment fund or other collective investment vehicle would be deemed a U.S. person if it is (directly or indirectly) majority-owned by one or more natural persons or legal entities that meet prong (i) or (ii) of the definition of the term "U.S. person" in the Final Order. For purposes of this alternative prong (iv), majority-owned would mean the beneficial ownership of 50 percent or more of the equity or voting interests in the collective investment vehicle. The alternative prong (iv) would include a minor modification to clarify that it applies regardless of whether the collective investment vehicle is organized or incorporated in the United States. Similar to the alternative prong (ii)(B) discussed above, the collective investment vehicle's place of organization or incorporation would not be determinative of its status as a U.S. person.

The alternative prong (iv) would clarify that a pool, fund, or other collective investment vehicle that is publicly traded will be deemed a U.S. person only if it is offered, directly or indirectly, to U.S. persons. This would address concerns expressed by

commenters that ownership verification is particularly difficult for pools, funds, and other collective investment vehicles that are publicly traded.²⁶

The alternative prong (iv) would be as follows:

- (iv) A commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (ii) and that is directly or indirectly majority-owned by one or more persons described in prong (i) or (ii), except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly-traded but not offered, directly or indirectly, to U.S. persons

This alternative proposed prong (iv) is intended to capture collective investment vehicles that are created for the purpose of pooling assets from U.S. investors and channeling these assets to trade or invest in line with the objectives of the U.S. investors, regardless of the place of the vehicle's organization or incorporation. These collective investment vehicles may serve as a means to achieve the investment objectives of their beneficial owners, rather than being separate, active operating businesses. As such, the beneficial owners would be directly exposed to the risks created by the swaps that their collective investment vehicles enter into. The Commission requests comment on all aspects of this alternative prong (iv).

Issued in Washington, DC on December 21, 2012, by the Commission.

Sauntia S. Warfield

Assistant Secretary of the Commission

²⁶ See Letter from Security Industry and Financial Markets Association (Aug. 27, 2012) at A-20.

Appendices to Further Proposed Guidance Regarding Compliance with Certain Swap
Regulations—Commission Voting Summary

NOTE: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton, O’Malia and Wetjen
voted in the affirmative; Commissioner Sommers voted in the negative

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